Supreme Court, U.S.
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No. 99-1569

In The

Supreme Court of the United States

FRED DAVIS,

Petitioner,

v.

HANOVER INSURANCE CO.,

Respondent.

On Petition For Writ Of Certiorari To The Massachusetts Supreme Judicial Court

BRIEF IN OPPOSITION

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RESPONDENT'S OBJECTIONS TO THE QUESTIONS PRESENTED FOR REVIEW

The Petitioner has presented seven (7) issues for this Court to review. Respondent maintains that none of the questions presented merits this Court's review. Issues I, II, IV, V, VI and VII do not even mention a federal question or a constitutional issue. The only purported issue that even mentions the United States Constitution (Issue III) does so in such an unspecified manner, without proper legal argument, that, on its face, it presents no "compelling reason" (as stated in Rule 10 of the United States Supreme Court Rules) for review by this Court.

Importantly, in dismissing the claim underlying this action, the Massachusetts Appeals Court upheld a Superior Court ruling that "the instant action is substantially identical to the Complaint brought by Davis, docket # 93-00575 [sic; "93-00574"], on March 10, 1993. Thus, based on the doctrine of Res Judicata, the complaint must fail as to all counts" [App. 38].

Therefore, and regardless of Petitioner's strained and contrived issues, there was an independent and entirely state-based foundation for the state disposition of this case. "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); quoted in *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

More specifically, the Petition, on its face, fails to identify, much less argue, any "important federal question" or "important question of federal law" within the meaning of U.S. Supreme Court Rule 10(b) or 10(c).

LIST OF PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are the Petitioner, Fred Davis, and the Respondent, Hanover Insurance Company. Notwithstanding Petitioner's unceasing attempts to bring Hanover's attorneys personally into this matter, they have never been parties hereto.

Pursuant to Supreme Court Rule 29.6, the Respondent supplies the following information concerning the corporate structure of the defendant:

1. The Hanover Insurance Company is a New Hampshire Corporation, with a principal place of business at 100 North Parkway, Worcester, MA, which is wholly owned by Allmerica Property and Casualty Companies, Inc., which is a Delaware Holding Company, with a principal place of business at 440 Lincoln Street, Worcester, MA.

2. Allmerica Property and Casualty Companies, Inc., is publicly traded on the New York Stock Exchange.

3. Allmerica Financial Corporation is a Delaware Holding Company, with a principal place of business at 440 Lincoln Street, Worcester, MA.

4. Allmerica Financial Corporation is publicly traded on the New York Stock Exchange and it is the indirect parent company of Allmerica Property and Casualty Companies, Inc., and Citizens Corporation, which is a Delaware Holding Company with a principal place of business at 440 Lincoln Street, Worcester, MA.

LIST OF PARTIES TO THE PROCEEDINGS – Continued

5. Citizens Corporation is publicly traded on the New York Stock Exchange.

6. Allmerica Financial Corporation, through its wholly owned subsidiary First America Financial Life Insurance Company ("First America"), a Massachusetts insurer and SMA Financial Corp., a Massachusetts Holding Company which is a wholly owned subsidiary of First America, owns 59.47 percent of the Common Stock of Allmerica property and Casualty Companies, Inc.

7. The Hanover Insurance Company owns 82.5 percent of the Common Stock of Citizens Corporation.

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CITATIONS TO OPINIONS AND ORDERS ENTERED IN THIS CASE

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Davis v. Hanover Insurance Company, (1999); Massachusetts Appeals Court Memorandum of Decision, dated Nov. 22, 1999; unreported; at App. 42.

Davis v. Hanover Insurance Company, Massachusetts Supreme Judicial Court denial of Further Appellate Review Application, dated January 26, 2000; unreported; *see* App. 43.

CONCISE STATEMENT OF JURISDICTION

Petitioner states that "[t]his Court's jurisdiction is invoked under 28 United States Code" [Petitioner's Br., p. 2]. This assertion of jurisdiction is overly vague and does not comply with Rule 14(1)(e) of the United States Supreme Court Rules. It is assumed that the Petitioner is claiming that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a), however, § 1257(a) applies, at best, only to Issue III.

Petitioner's Issues I, II, IV, V, VI and VII do not even remotely resemble the types of questions identified in § 1257(a) that call for review by this Court.

Regarding Petitioner's Issue III, although he has made some vague allegation about a right to a jury trial

and the "Seventh Amendment to the United States Constitution", he has not indicated how that Amendment is implicated in this case (which it clearly is not – *see* Argument Section III).

Also, there are other compelling reasons, set forth below, why this Court should refuse to accept jurisdiction over this issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no federal statutory provisions involved in this matter.

The only United States Constitution provision that is referred to by Petitioner is "the Seventh Amendment of the United States Constitution" [Petitioner's Brief, p. 11]: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

CONCISE STATEMENT OF THE CASE

This is now the fourth time that this Petitioner has sought relief from this Court in this, and directly related, matters. *See* United States Supreme Court Docket Nos. 96-640, 96-1074, and 98-1867.

In its most simplified form, the instant matter merely presents a question of state law: under Massachusetts

law, is a defendant entitled to a dismissal of a civil complaint, on the basis of claim preclusion, in circumstances where an earlier action was decided for defendant on a motion for summary judgment, and where the second claim derives directly from the same transaction and series of connected transactions as in the first, and where the plaintiff in the earlier case had every incentive and opportunity to fully litigate the matter at that time?

The case stems from a 1987 motor vehicle accident between the Petitioner, Fred Davis ("Petitioner"), and Anthony Lauria, who was insured under an automobile insurance policy by Hanover Insurance Company ("Respondent"). Petitioner filed his action against Lauria in the Suffolk County Superior Court and the case was subsequently transferred to the Boston Municipal Court ("BMC") for trial, pursuant to M.G.L. c. 231, § 102C. The case was reported settled by the parties on October 9, 1991, and a "NISI order" order entered the same day, indicating, in effect, that the case would be dismissed as to all claims on November 12, 1991.

A settlement for $20,000 was arrived at between Petitioner's lawyer, Robert Adams, and Hanover. Prior to consummation of the settlement, it was discovered that Petitioner's prior lawyer, Stuart Ravech, had served the parties with a notice of attorney's lien. At that point, in accordance with Massachusetts law [*see* M.G.L. c. 221, § 50], Hanover insisted that any settlement draft include the name of Petitioner's prior lawyer, Mr. Ravech. Petitioner then refused to accept the settlement funds and has since filed a series of frivolous lawsuits and appeals in an attempt to obtain the settlement proceeds while escaping the attorney's lien. Hanover's position in this matter

(essentially that, under Massachusetts law, it had an obligation to protect the attorney's lien) has been vindicated at every turn.

Petitioner then brought an action in Norfolk County Superior Court (docket No. 93-00574) directly against Hanover alleging breach of the settlement agreement, unspecified violations of M.G.L. c. 93A, and unintelligible and unspecified violations of Petitioner's rights as a senior citizen. Hanover moved for summary judgment on the issue of its obligation to honor the attorney's lien. The motion for summary judgment was allowed "in its totality" by the trial court [App. 45]. That ruling was upheld at the Massachusetts Court of Appeals [App. 46], and at the Massachusetts Supreme Judicial Court [App. 47]. Certiorari was denied by this Court in No. 96-640 [App. 48], as was Petitioner's Motion for Rehearing [App. 49].

The Norfolk County Superior Court decision (in docket No. 93-00574) is central here because that summary judgment held that there was no breach of the settlement agreement by Hanover – and it is that holding which formed the basis for the Trial Court's application of res judicata principles to the instant case [*see* App. 38; Superior Court holding in this case].

While that earlier matter (Norfolk Superior docket No. 93-00574) was still pending, Petitioner filed a complaint in the United States District Court for the District of Massachusetts (Civil Action No. 95-11837MLW) against Hanover and its Chairman of the Board, alleging various state and federal constitutional violations as a result of Hanover's insistence that it honor the attorney's lien.

Petitioner also alleged that the Superior Court judge and Hanover's attorney would not allow the record to be assembled in the original case, thereby depriving him of his right to appeal. This complaint was dismissed by the District Court, on Hanover's Motion to Dismiss [App. 50]. This dismissal was upheld by the First Circuit Court of Appeals [App. 54]; and this Court denied Petitioner's Petition for a Writ of Certiorari [App. 56] and then denied a motion for rehearing [App. 57].

It was at this point that Petitioner sought to revive the original matter (that had been reported settled in 1991). He first sought to remove the original dismissal of that action in the BMC [App. 58]. This Motion was denied [App. 60]. After the matter had been inadvertently retransferred to the Superior Court, defendant filed a Motion to Vacate that Retransfer [App. 61], and Petitioner filed an Opposition to that Motion [App. 66]. The Suffolk Superior Court allowed defendant's motion to vacate retransfer [App. 70]. The Massachusetts Appeals Court entered a Memorandum and Order affirming the Superior Court [App. 72]. The Petitioner sought leave to obtain further appellate review from the Massachusetts Supreme Judicial Court [App. 74], and this Application was denied [App. 84]. Certiorari was denied by this Court in No. 98-1867 [App. 85].

In the instant matter, after the Appeals Court affirmed the allowance of the Superior Court dismissal of Davis' Complaint [App. 42], Davis' Petition for Further Appellate Review by the Supreme Judicial Court was also

denied [App. 43]. It is from this proceeding that Petitioner now seeks review in this Court on a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Within the meaning of *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), there were "separate, adequate, and independent grounds" to support the state court decision in this matter, which precludes this Court from review of same.

Petitioner's Issues I, II, IV, V, VI and VII do not involve federal or constitutional questions at all. The other Issue (III) raises no important federal question whatever; and the Seventh Amendment right to a jury trial is inapplicable on these facts (based on well-established state practice – see argument below).

The case merely involves the application of well-developed state practices of precluding re-litigation of issues already decided in a final judgment from an earlier judicial proceeding.

Regarding Issue I, this issue is not appropriate for certiorari since it was not presented or decided in the state court. The application of state principles of res judicata is not an appropriate issue for the grant of certiorari.

Regarding Issue II, even an erroneous judgment, if unreversed on appeal, is entitled to the preclusive effect of res judicata. A state court decision based on adequate and independent state law will not be reviewed by this Court.

Regarding Issue III, there is an unrebutted presumption that this issue was not properly presented at the state court level. The Seventh Amendment to the United States Constitution does not apply to civil trials in Massachusetts. Petitioner has presented no authority to demonstrate that a party has a right to a jury trial even in a meritless case.

Regarding Issue IV, this issue was deemed waived by the Appeals Court. Under Massachusetts Rules of Civil Procedure, a defendant need not file an answer to a complaint until a motion to dismiss is denied – in this case, it was allowed so no answer was necessary.

Regarding Issue V, it is, at worst, incomprehensible, and, at best, merely a re-hash of his arguments on the merits of his underlying complaint, which was never reached because it was dismissed.

Regarding Issue VI, there is no federal court jurisdiction regarding the conduct of an attorney in state court proceedings. Attorney Suslak is not a party to these proceedings. Petitioner has not been prejudiced in any way by an inadvertent 2-day delay in service of a motion. Petitioner should be admonished from bringing this or any similar action again in the federal courts.

Regarding Issue VII, there is no federal court jurisdiction regarding the appearance or conduct of attorneys in state court proceedings. Additionally, as this issue was not properly presented or decided at the state court level, it was deemed waived on appeal in the state court, and it cannot be reviewed on this Petition.

ARGUMENT FOR DENIAL OF PETITION

This case has nothing to do with the issues which Petitioner attempts to raise in his Brief. The underlying case here merely involved the application of well-settled state principles of res judicata, raising no federal or constitutional issues whatsoever.

In his Brief, the Petitioner has never addressed the one issue that should be central to his Petition – to wit; why should this Court grant a petition for certiorari on a civil matter decided in a state court based on local principles of res judicata?

On every issue in his entire Brief, Petitioner has failed to identify any "important federal question" or "important question of federal law", within the meaning of Rule 10(b) or (c) of the United States Supreme Court Rules. This Court should not review the judgment of a state court "except where a substantial federal question is involved". *Reich v. City of Freeport*, 388 F.Supp. 953, 955 (N.D.Ill. 1974), aff'd 527 F.2d 666 (1976).

Petitioner has had his day in court on each of the collateral issues which he inappropriately seeks to inject into this case. Because he has failed to address the singularly relevant question, Davis' Petition should be summarily denied.

Petitioner should also be admonished not to bring any further actions in the federal courts, in the nature of petitions for certiorari or otherwise, which arise in any way from the same transactions or series of events which has formed the basis of the several cases which he has brought against Hanover, or its insured, Anthony Lauria.

ISSUE I

Petitioner Did Not Raise This Issue At The State Court Level; And Petitioner Has Not Complied With Supreme Court Rule 14

Petitioner is now, for the first time in this case, arguing some incomprehensible theory of bait and switch allegedly being employed by the Respondent.[1] Also for the first time, he makes some amorphous suggestion regarding banning the Respondent from doing business in the United States. Even if either of these purported issues remotely resembled a recognizable cause of action, it can not be raised here for the first time. A question not presented or decided in the state court can not be considered on a petition for certiorari. *Street v. New York*, 394 U.S. 576, 582 (1969).

As a substantive matter, Petitioner's argument about what he calls "bait and switch" is merely a repetition of his frequent arguments on what he perceives as the merits of his original complaint. The issue regarding the appropriateness of Hanover's reliance on the Massachusetts attorney's lien statute was decided in Norfolk Superior Court docket No. 93-00574 (affirmed all the way through this court in No. 96-640). As such, it formed the basis of the trial court's res judicata decision in the instant case.

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[1] It should be noted that Davis indeed made a similar argument about "bait and switch" in his opposition to the original summary judgment motion against him in Norfolk Superior Court No. 93-00574 (which was ruled against him and affirmed all the way through this Court, in 96-640). This is the first time, however, that Davis has raised that issue in this case.

Petitioner's suggestion regarding the banning of Respondent from doing business in the United States is sheer nonsense, not worthy of comment.

Most importantly, Petitioner has provided no argument as to why the application of res judicata principles in the instant matter presents a federal question or federal constitutional issue which is reviewable by this Court.

ISSUE II

The State Court Has Already Applied Res Judicata Against Petitioner On These Issues

The Massachusetts Court of Appeals affirmed the trial court "[f]or substantially the reasons set forth in the Superior Judge's Memorandum of Decision and Order . . . allowing the defendant's motion to dismiss on grounds of res judicata, we affirm." [App. 42].

The central language from the Superior Court decision was that:

> [T]his court finds that the instant action is substantially identical to the Complaint brought by Davis, docket No. 93-00574, on March 10, 1993. Thus, based on the doctrine of res judicata, the Complaint must fail as to all counts.

[App. 38].

Petitioner's Brief is replete with arguments on what he perceives as the substantive issues of his complaint. There is only one sentence in his entire Petition that even remotely approaches argument on the central issue here. At page 9 of his Petition, he states: "The inferior court

erred in its decision when it based its decision on a prior action which is erroneous."

The above sentence, alone, demonstrates, once again, that the Petitioner entirely miscomprehends the current status of this case and what he must show in order to justify the grant of a petition for certiorari.

Of course, the documents demonstrate that the trial court's decision in the instant matter was absolutely correct, as was the affirmance of that decision by both the Appeals Court and the Supreme Judicial Court. These decisions were based on the decision in the earlier case (Norfolk Superior Court docket No. 97-0574), which could not have been more final, having been appealed all the way through this Court (in No. 96-640). Therefore, and even if that earlier decision had been erroneous, its finality precludes relitigation of the same issues.

> A judgment of a court with jurisdiction stands, and is not void, unless reversed under some recognized and available procedure, even if that judgment is erroneous.

Streeter v. Worcester, 336 Mass. 469, 471-472 (1957); quoted in *Griffin v. Westfield*, 35 Mass.App.Ct. 324, 327-328 (1993).

> Probably no principle is more deeply embedded in our law than that which teaches that a litigant is entitled to his day in court but no more. It is a salutary principle. It is the very essence of the doctrine of res judicata. In every case there comes a time when litigation must end. Ordinarily that occurs when the parties have had a fair opportunity to present their case to a court

> and the appropriate appellate process has been exhausted or waived.

Quincy v. Brooks-Skinner, Inc., 325 Mass. 406, 415 (1950).

Thus, there were ample grounds based on settled state law, both independent and separate from any potential federal question, to support the decision in this case. "When a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); citing *Michigan v. Long, supra.* And *see, Harris v. Reed*, 489 U.S. 255, 260-262 (1989).

ISSUE III

There Is No Seventh Amendment Issue in This Case

This is the only even remotely relevant federal issue raised by Petitioner. The record is clear, however, that neither the Appeals Court nor the Supreme Judicial Court addressed this issue at all [*see* App. 42; App. 43]. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . and the aggrieved party bears the burden of defeating this assumption." *Adams v. Robertson*, 520 U.S. 83 (1997). In his Issue III, Petitioner has not even addressed this requirement.

Further, Petitioner only complains of a violation of the Seventh Amendment to the United States Constitution, not the Massachusetts Constitution or Declaration of Rights. It is well settled that the federal constitution does not prevent a state from adopting its own methods of

pretrial procedure, including the abolishment of jury trials altogether. *Baldassare v. Crown Furniture Company, Inc.*, 349 Mass. 183, 191 & n.7 (1965). *See Doherty v. Retirement Board of Medford*, 425 Mass. 130, 137 (1997), noting that "the Seventh Amendment does not apply to State civil proceedings"; and "[t]he Seventh Amendment is not applicable to the States" (*id.* at n.5). Thus, Davis' Seventh Amendment argument has no merit whatsoever.

> We find no merit in the defendant's argument that it was denied its constitutional right to a trial by jury when the judge ordered a new trial. ***This argument is expressed to us solely in terms of the Seventh Amendment to the Constitution of the United States which has no application to this State civil trial.***

Galvin v. Welsh Manufacturing Co., 382 Mass. 340, 345 (1981) (emphasis added).

Lastly, even had Petitioner based his complaint for a jury trial on the Massachusetts Declaration of Rights (Art. 15), it is preposterous to suggest that a person has a right to a jury trial in a meritless case. The right to a jury trial is not absolute. *Paro v. Longwood Hospital*, 373 Mass. 645, 654 (1977). It has long been settled that a party does not have a right to a jury trial on equitable matters. *Keville v. McKeever*, 42 Mass.App.Ct. 140, 147 (1997), and cases cited. The right to a jury trial "may be regulated as to the mode in which it shall be exercised so long as such regulation does not impair the substance of the right". *H.K. Webster Co. v. Mann*, 269 Mass. 381, 385 (1929); quoted in *Orasz v. Colonial Tavern, Inc.*, 365 Mass. 131, 134 (1974).

> The Legislature, by statute, or the court, by rule, may regulate the mode or manner by which the right is exercised.

Islami v. Needham, 38 Mass.App.Ct. 442, 445 (1995).

Pursuant to the authority given to them, state courts have developed rules of civil procedure which regulate the exercise of the right to a jury trial by creating rules which permit such procedures as summary judgment, pre-trial dismissal and judgment notwithstanding the verdict.

> The right to a jury trial does not grant to a party the right to put to a jury any question he or she wishes. Rather, the right to a jury trial means that, with respect to those questions of fact that the substantive law makes material, the party has the right to have the determination made by a jury.

English v. New England Medical Center, Inc., 405 Mass. 423, 426 (1989).

ISSUE IV

There Is No Basis For The Grant Of Certiorari Concerning Whether The Trial Court Erred In Failing To Order Judgment Against Respondent For Failure To Answer Petitioner's Complaint

As an initial matter, this issue was most likely deemed to have been waived by Petitioner by the Appeals Court since he never noticed his appeal from the trial court denial of the motion in which he raised this issue [*see* Petitioner's App. 3]. Under Massachusetts law, a party must specify the order or part thereof being

appealed from. Massachusetts Rules of Appellate Procedure, Rule 3(c). And *see, Bateman v. Consolidated Rail Corp.*, 45 Mass.App.Ct. 916, 917-918 (1998). Petitioner never gave notice of an appeal from the denial of that motion (the trial court treated it as a Motion for Default Judgment [Docket Sheet item # 8; App. 2]).

Even if Petitioner were entitled to be heard on this issue, either in the Massachusetts appellate courts or here, there is still no issue warranting the grant of certiorari.

Pursuant to Rule 12(a)(2) of the Massachusetts Rules of Civil Procedure, the filing of a motion to dismiss shall stay the time period for filing an answer to a complaint. *See White v. Metropolitan District Commission*, 21 Mass.App.Ct. 106, 107-109 (1985); *Finney v. Madico, Inc.*, 42 Mass.App.Ct. 46, 53 n.9 (1997). *See also Rogers v. Commissioner of Correction*, 25 Mass.App.Ct. 399, 401 (1988), noting that either an answer or a motion to dismiss is an appropriate responsive pleading under the rules.

Even the affirmative defense of res judicata may be raised in a motion to dismiss (rather than an answer) where the face of the complaint shows the existence of this defense. *Cavanaugh v. Cavanaugh*, 396 Mass. 836, 838 (1986).

Thus, even if Petitioner had properly preserved the issue concerning his motion entitled JUDGMENT AGAINST HANOVER INSURANCE COMPANY [see Petitioner's App. 3], he would still have lost on the merits because Hanover's Motion to Dismiss was granted and there was no occasion for the filing of an answer.

Once again, this is purely a matter of the application of state law which raises no issue warranting consideration on a writ of certiorari.

ISSUE V

There Is No Reason To Grant Certiorari On The Basis That "The Inferior Court Erred In Its Statement Of Both The Introduction And Background In Its Decision"

This argument by Petitioner (at pp. 13-15 of his Brief) is virtually incomprehensible. He first refers to the language in the trial court's Memorandum of Decision and Order on Defendant's Motion to Dismiss and for Sanctions, to the effect that: "For the reasons set forth below, the defendant's motion to dismiss will be allowed." [App. 35].

He then says "There are no reasons below". In fact, the trial court gave ample reasons in support of its decision, all of them correct.

Once again, petitioner delves into an argument on the merits of his original case, and presents this court with no argument as to why the grant of certiorari would be warranted on this issue.

From Respondent's perspective, it is not possible to counter the argument when that argument is not comprehensible.

ISSUE VI

The Attorney Is Not A Party To These Proceedings; This Court Has No Jurisdiction Relating To The Conduct Of Attorneys In State Court Proceedings; And Sanctions Should Be Entered Against Petitioner

Petitioner has pointed this Court to no authority supporting the exercise of jurisdiction by this Court relating to the conduct of attorneys in state court proceedings, likely because there is no such authority. The Court's lack of authority is sufficient to preclude the grant of certiorari on such an issue.

Petitioner's allegations regarding attorney Suslak [see Petitioner's Brief, pp. 15-17] have been appropriately resolved by the trial court in its express ruling not to enter any sanctions against Suslak [App. 40]. This is altogether appropriate in the circumstances, since the allegations are scurrilous, immaterial, absolutely untrue and without merit. Petitioner's continued repetition of these accusations makes them no more believable or relevant than they were when first made.

Petitioner also complains that attorney Suslak intentionally delayed two days in mailing him the Motion to Petitioner [see Petitioner's Brief, pp. 16-17]. Even if there was a two day delay, there is no evidence to suggest that it was anything other than a clerical error, and Petitioner failed to demonstrate that he was prejudiced in any way by the delay. He alleges that it "was done to deprive the plaintiff sufficient time to oppose his document" [*id.* p. 12]. Yet he never asked the court or counsel for Hanover for an extension of time to respond (which undoubtedly would have been granted). Further, the motion to dismiss

was not decided until some five months later and Davis never sought to file any supplemental papers in support of his position. The motion was denied, after a full hearing, on its merits and the two day delay in mailing the motion was meaningless.

Lastly, Massachusetts Superior Court, Rule 9A(a)(2) requires an opposition to be served "within 10 days after service of a motion". Therefore, Davis had ten days from the time he received the motion, regardless of when the Certificate of Service said it had been mailed. Alternatively, he could have sought clarification from the court if he believed the papers were not placed in the mail on the date reflected on the Certificate of Service.

Furthermore, Petitioner repeatedly raises this nonsense issue at every opportunity. It was raised in his most recent Petition for a Writ of Certiorari (No. 98-1867); and it is inappropriate in the instant matter for precisely the same reasons it was inappropriate in that earlier matter.[2] Attorney Suslak is not, and never has been, a party to these proceedings. Even if he had been, Petitioner has presented no authority for the concept that this Court has jurisdiction to concern itself with matters related entirely to disciplinary rules for attorneys.

At the time of the filing of Respondent's Brief in Opposition to a Writ of Certiorari in No. 98-1867, it was noted that Petitioner had already been admonished in the state trial court to the effect that "[s]hould the plaintiff,

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[2] With apologies to the Court, this Brief will draw liberally from that earlier Opposition since it calls for precisely the same response.

Fred Davis, bring another duplicative complaint against this defendant, Hanover Insurance Company, sanctions should be considered at that time" [App. 40]. At that time, Respondent was seeking an express affirmance of that admonition from the Massachusetts Appeals Court. The Appeals Court has now ruled and has expressly stated: "We call to the attention of the plaintiff [Petitioner/Davis] the judge's warning that sanctions will be considered if the plaintiff brings another duplicative complaint against the defendant" [App. 42].

Recognizing that this Court has established a practice of admonishing petitioners in appropriate circumstances – *Whitaker v. Superior Court of California*, 514 U.S. 208 (1995) – it is respectfully requested that this Court enter an order prohibiting this Petitioner from bringing any further actions or petitions in the federal courts which spring from the same transactions or series of events which underlie this matter.

ISSUE VII

The Appearance Of Attorney Flanagan On Behalf Of Respondent Presents No Grounds For Granting A Writ Of Certiorari

As with Issue VI above, Petitioner has provided no authority supporting the exercise of jurisdiction by this Court relating to the appearance or the conduct of attorneys in state court proceedings.

Petitioner raised this issue, for the first time in this matter, at the Appeals Court level. Under Massachusetts law, issues which were not raised at the trial court level

are deemed to have been waived on appeal. *Palmer v. Murphy*, 42 Mass.App.Ct. 334, 677 N.E.2d 247 (1997), and cases cited..

It is clear from the Memorandum and Decision of the Appeals Court that it did not even consider this issue and obviously considered it waived. As such, it was not properly presented or decided at the state court level and can not be considered on a petition for certiorari. *Street v. New York, supra*, at 394 U.S. 582.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied in all respects.

Respectfully submitted,

GEORGE R. SUSLAK, ESQ.
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NORFOLK COUNTY
SUPERIOR COURT
CIVIL DOCKET
LAW AND EQUITY

Docket No. 97-1716

Fred Davis *vs.* Hanover Insurance Company

Ad Damnum $ _____ Date of Writ _____

DOCKET ENTRIES

Counsel for Plaintiff	Counsel for Defendant
Fred Davis (Pro Se) P. O. Box 721 Everett, MA 02149 (617) 322-8223	George R. Suslak, Esq. Stanton & Lang 200 Broadway, P. O. Box 1080 Lynnfield, MA 01940-2314 (781) 595-1440

1.	1997 Sept. 8	Complaint
2.	1997 Sept. 8	Cover Sheet
	1997 Sept. 8	Fast Track Notice sent to Fred Davis (Pro Se)
3.	1997 Sept. 15	Return of Service Re: Hanover Insurance Company – In Hand to Robin LeVangie, Clerk Served on Sept. 9, 1997
4a.	1997 Oct. 14	Deft's Motion to Dismiss Pursuant to Rule 12 (b) (6) and Motion for Sanctions – date Received Oct. 6, 1997
4b.	1997 Oct. 14	Deft's Memorandum of Law in Support of Motion to Dismiss – date Received Oct. 6, 1997
4c.	1997 Oct. 14	Affidavit of George R. Suslak, Esq. – date Received Oct. 6, 1997

4d.	1997 Oct. 14	Affidavit of George R. Suslak, Esq. – date Received Oct. 6, 1997
4e.	1997 Oct. 14	Plff's Opposition to Deft's Motion to Dismiss Pursuant to Rule 12(b) (6) and Motion for Sanctions – date Received Oct. 6, 1997
5.	1997 Nov. 21	Rule 9A Scheduling Order Re: Deft's Motion to Dismiss and for Sanctions with Opposition Scheduled for Dec. 9, 1997 at 2:00 p.m. before Judge Gants c.s.
6a.	1997 Nov. 2	Deft's Motion for Taxation of Costs
6b.	1997 Nov. 2	Plff's Motion in Opposition to Deft's Motion for Taxation of Costs and Additional Sanctions Against Attorney George R. Suslak for Continuing to Tell Falsehoods to the Court and the Court Order Costs to the Plaintiff
7.	1997 Nov. 2	Rule 9A Scheduling Order Re: Deft's Motion for Taxation of Costs with Opposition Scheduled for December 9, 1997 at 2:00 p.m. before Judge Gants C.S.
	1997 Dec. 10	Re: Deft's Motion to Dismiss Pursuant to Rule 12(b) (6) (p.#4a) – Hearing is continued to January 20, 1998 at 2:00 p.m. (Gants, J.) c.s.
8.	1998 Jan. 5	Judgment Against Hanover Insurance Company – Court Treats This As A Motion for Default Judgment – hearing is scheduled for January 20, 1998 at 2:00 p.m. (Butler, J.) dated Dec. 30, 1997 c.s.

9.	1998 Jan. 5	Rule 9A Scheduling Order Re: Judgment Against Hanover Insurance Co. (Motion for Default Judgment); Deft's Motion for Taxation of Costs; Deft's Motion to Dismiss and Motion for Sanctions with Opposition Scheduled for January 20, 1998 at 2:00 p.m. before Judge Doerfer c.s.
10.	1998 Mar. 13	Plff's Sanctions Against Attorney George R. Suslak for Telling Falsehoods to the Court and Perjury Charges Against George R. Suslak
	1998 Mar. 13	Re: Plff's Opposition to Deft's Motion to Dismiss Pursuant to Rule 12(b) (6) and Motion for Sanctions (p.#4e) Motion for Sanctions is DENIED: See Memorandum of Decision and Order. (Doerfer, J.) dated March 12, 1998 c.s.
	1998 Mar. 13	Re: Deft's Motion to Dismiss Pursuant to Rule 12(b) (6) and Motion for Sanctions (p.#4a) Motion to dismiss is ALLOWED: Motion for Sanctions is DENIED: See Memorandum of Decision and Order. (Doerfer, J.) dated March 12, 1998 c.s.
11.	1998 Mar. 13	Memorandum of Decision and Order on Defendant's Motion to Dismiss and Motion for Sanctions (Doerfer, J.) dated March 10, 1998 c.s.

12.	1998 Mar. 13	Judgment on Motion to Dismiss (Doerfer, J.) dated March 12, 1998 c.s.
	1998 Mar. 16	Re: Judgment Against Hanover Insurance Company (copy of Paper #8) DENIED. (Doerfer, J.O dated March 2, 1998 c.s.
13.	1998 Mar. 23	Plff. Fred Davis' Notice of Appeal from Judgment dated March 12, 1998 – date Received March 20, 1998
14.	1998 Mar. 27	Notice of Service of Notice of Appeal Re: The Honorable Gordon L. Doerfer, Associate Justice of the Superior Court, Norfolk Superior Court, 650 High St., Dedham, MA 02026; George R. Suslak, Esq., Stanton & Lang, 200 Broadway, P. O. Box 1080, Lynnfield, MA 01940
	1998 Jun. 11	Transcript of the Motion Hearing before Judge Doerfer on Tuesday, January 20, 1988 Filed n.s.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
No. 93 00574

FRED DAVIS,
Plaintiff

V.

HANOVER INSURANCE COMPANY, et al
Defendants

COMPLAINT

JURY TRIAL REQUESTED ON ALL COUNTS

1. Plaintiff, Fred Davis, of Malden, County of Middlesex, Commonwealth of Massachusetts.

2. Defendant, Hanover Insurance Company, of Braintree, County of Norfolk, Commonwealth of Massachusetts.

3. Defendant's usual place of business is located at 33 Braintree Hill Park, Braintree, Massachusetts.

COUNT I

September 20, 1991, plaintiff signed a contract with Hanover Insurance Company under the following terms and conditions; [sic] (1) amount of consideration $20,000.00. (2) draft payable to Fred Davis and his-attorney [sic] Robert T. Abrams. (3) Draft is to be paid within 30 days. (4) this contract was executed as a sealed instrument.

Hanover Insurance Company knowingly and wilfully breached this contract. Hanover failed to fulfill its obligation.

As a result of this breach of the contract the plaintiff sustained monetary losses, pain and suffering and harassment.

COUNT II

CAUSE OF ACTION

The plaintiff and the defendant entered into a contract, however, the defendant knowingly and wilfully breached the terms and conditions of the contract.

Hanover Insurance Company did not fulfill its obligation to the plaintiff, causing him monetary losses, pain and sufering [sic] and harassment.

COUNT III

M.G.L. c. 93A

At all times relevant to this action defendant was engaged in trade or commerce in the Commonwealth of Massachusetts within the meaning of M.G.L. c. 93A.

The acts and practices of Hanover Insurance Company as described herein were unfair and deceptive within the meaning of M.G.L. c. 93A.

The acts and practices of the defendant were wilful and knowing violations of M.G.L. c. 93A.

The acts and practices of Hanover Insurance Co. were unfair and deceptive within the meaning of M.G.L. c. 93A and as a result plaintiff suffered substantial losses of money.

COUNT IV

The plaintiff is a senior citizen.

Hanover Insurance Company wants to cheat the plaintiff out of monies that are due to him.

The defendants acts are also being used to harass, hurt and harm the plaintiff.

V. RELIEF FROM THE COURT

Plaintiff requests the following relief from the court:

1. Amount of contract $20,000.00.
2. Interest from September 20, 1991
3. Pain and suffering $10,000.00.
4. Pursuant to M.G.L. c. 93A double or triple damages along with interest from September 20, 1991.
5. Costs, legal fees and other relief the court may deem appropriate.

Jury trial requested on all counts.

By /s/ Fred Davis
Fred Davis
353 Bryant Street
Malden, Ma. 02148
(617) 322 8578

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

DEDHAM SUPERIOR COURT
CIVIL BUSINESS
CIVIL ACTION NO. 97 01716

Fred Davis, Plaintiff

vs.

Hanover Insurance Company, Defendant

COMPLAINT

Parties

Plaintiff, Fred Davis P.O. Box 721 Everett, Ma 02149, County of Middlesex.

Defendant, Hanover Insurance Company conducting business at 35 Braintree Hill Park Braintree, Ma 02184, County of Norfolk.

Facts

The defendant, Hanover Insurance Company engaged in acts of unfair and deceptive business practices.

The defendant, Hanover Insurance Company engaged in acts of Financial Exploitation of a senior citizen.

The defendant, Hanover Insurance Company engaged in acts against the disabled.

Cause of Action

The plaintiff, Fred Davis, is a senior citizen and partially disabled.

The defendant, Hanover Insurance Company by means of fraud, unfair, and deceptive business practices swindled monies from the plaintiff.

The plaintiff issued a 30 day letter to the defendant pursuant to Massachusetts General Laws c. 93A. There was no response from the defendant.

As a direct and proximate result of the fraud, unfair and deceptive acts by the defendant Hanover Insurance Company, plaintiff suffered substantial losses of money and pain and suffering, physical and emotional distress.

Defendant engaged in acts of Financial Exploitation which caused a substantial monetary loss to the elderly plaintiff which gain would have benefited [sic] the elderly plaintiff thereby violating Massachusetts General Laws 19A section 14.

The defendants acts also violated the Crimes Against the Disabled, by knowingly and wilfully swindling monies from the disabled.

Plaintiff was discriminated against and taken advantage of because of his disability.

Relief From The Court

WHEREFORE, the plaintiff requests the sum of $500,000.00, plus triple damages, legal fees and costs pursuant to the Massachusetts General Laws chapter 93A and any other relief the court deems appropriate.

/s/ Fred Davis
Fred Davis, Plaintiff
P.O. Box 721
Everett, Ma 02149
(617) 322 8223

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS DEDHAM SUPERIOR COURT
Civil No. 97-01716

****

FRED DAVIS,)
)
Plaintiff)
)
v.)
)
HANOVER INSURANCE)
COMPANY,)
)
Defendant)

****

DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

AND

MOTION FOR SANCTIONS

Now comes the defendant, Hanover Insurance Company (hereinafter, "Hanover"), and moves this Honorable Court to dismiss the entirety of the complaint of Fred Davis (hereinafter, "Davis"), pursuant to Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure.

Hanover further moves that this Court impose sanctions against Davis in the nature of an award of all of Hanover's expenses in defending this series of frivolous suits; and in the nature of a temporary and then permanent injunction restraining Davis from filing any further suits against Hanover, its agents or employees or attorneys relating to the same or similar subject matter.

AND IN SUPPORT HEREOF, Hanover states as follows:

1. This complaint should be dismissed on principles of res judicata (including both claim preclusion and issue preclusion), all as argued in the accompanying Memorandum of Law, the contents of which are incorporated herein by reference;

2. Any Counts in Davis' complaint purporting to allege violations of M.G.L. c. 93A must be dismissed for failure of Davis to prove the presentation of a 30-day demand letter, which is required under the statute;

3. The sanctions being sought in this Motion are entirely appropriate, all as argued in the accompanying Memorandum, given the frivolous and vexatious nature of Davis' continuing complaints, all of which spring from the same series of events and/or transactions.

Dated: 9/29/97

/s/ George R. Suslak
Attorney for Defendant
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(617) 595-1440

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS DEDHAM SUPERIOR COURT
Civil No. 97-01716

FRED DAVIS,)
)
Plaintiff)
)
v.)
)
HANOVER INSURANCE COMPANY,)
)
Defendant)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

STATEMENT OF FACTS

This matter stems from an automobile accident which allegedly occurred on February 11, 1987. The plaintiff, Fred Davis ("Davis"), filed a complaint against the driver of the other vehicle, Anthony Lauria ("Lauria"), in Suffolk Superior Court on or about January 18, 1990. This matter was remanded to the Boston Municipal Court ("BMC") on February 12, 1991. The BMC scheduled the case for trial on October 9, 1991. The case was reported settled to the BMC on October 9, 1991, and an order entered the same day that the case would be dismissed as to all claims on November 12, 1991, unless the parties filed an Agreement for Judgment. No Agreement for Judgment was filed, and the case was dismissed as of November 12, 1991.

Underlying this matter is the fact that a settlement for $20,000 was achieved in 1991 between Davis' lawyer (Robert Abrams) and Lauria's insurer (Hanover Insurance). In the interim, however, Davis' previous lawyer (Stuart Ravech) had served the parties with a notice of an attorney's lien. At that point, and appropriately so, Hanover insisted that any settlement draft include the name of Davis' prior attorney (Ravech). This entire series of frivolous lawsuits and convoluted proceedings has been generated by Davis in an attempt to obtain the settlement proceeds while escaping the attorney's lien.

Davis' first action against Hanover was in 1993 – *Davis v. Hanover*, Norfolk Superior Court, Civil No. 93-00574 [complaint attached as Exhibit "A"]. This was an action in three counts:

1. breach of contract (the contract being the settlement agreement);

2. unspecified violations of M.G.L. c. 93A; and

3. unintelligible and unspecified violations of Davis' rights as a senior citizen.

In its answer to this complaint [Exhibit "B"], Hanover made an Offer of Judgment: "Hanover Insurance Company, by its attorney, hereby tenders an Offer of Judgment to Fred Davis in the amount of $20,000, subject to an attorney's lien filed by Stuart Ravech, Esq.". Hanover's Answer also included a counterclaim against Davis, seeking declaratory and injunctive relief.

Hanover subsequently filed a Motion for Summary Judgment, arguing that: (1) there was no breach of contract because Hanover was required by law to honor the

attorney's lien; (2) Davis failed on procedural grounds to perfect his M.G.L. c. 93A rights (no demand letter; no damages), and there was no violation for the same reasons noted in issue #1; and (3) Davis had no facts to show Hanover had attempted to cheat Davis out of monies owed. Hanover's Summary Judgment Motion was allowed "in its totality" on August 25, 1993 [Exhibit "C"].

Davis then attempted to appeal that matter to the Appeals Court (Appeals Court No. 95-P-1818). The clerk of the Superior Court, quite appropriately, refused to assemble the record since Hanover's counterclaim was not resolved in the summary judgment motion (Hanover later voluntarily dismissed its counterclaim).

In his Brief in this matter, Davis began scurrilous, immaterial, and irrelevant personal attacks on counsel for Hanover. On June 14, 1996, the Appeals Court entered its Rule 1:28 Memorandum and Order, noting: "The judgment is affirmed substantially for the reasons set forth in the brief of the defendant" [Exhibit "D"].

Davis then sought Further Appellate Review in the Supreme Judicial Court, which was denied on July 24, 1996 [Exhibit "E"]. Davis then filed a Petition for Writ of Certiorari with the United States Supreme Court (Docket No. 96-640), which was denied on January 6, 1997 [Exhibit "F"]; and a Motion for Rehearing, which was denied on February 18, 1997 [Exhibit "G"].

While his original Norfolk Superior Court action was still pending before the Appeals Court, on August 16, 1995, Davis filed a complaint in the United Stated [sic] District Court for the District of Massachusetts (Civil

Action No. 9511837MLW), against Hanover and its Chairman of the Board, John F. O'Brien [Exhibit "H"]. This complaint essentially sought injunctive and monetary relief stemming from alleged violations of state and federal constitutional rights as a result of Hanover's insistence that it honor attorney Ravech's statutory lien. Davis contended that the Superior Court, the Superior Court judge and Hanover's attorney in the original suit would not allow the record to be assembled so that his Appeal of the Norfolk Superior Court matter could proceed.

On Hanover's Motion, the U.S. District Court dismissed this complaint on May 17, 1996 [see Memorandum and Order, attached as Exhibit "I"]. The U.S. District Court appropriately noted that no rights of Davis had been violated by any failure to assemble the record by the Superior Court:

> Under M.G.L. c. 231, § 113, a party can appeal only a "final judgment of the superior court . . . ". In the Superior Court action, the defendants filed a counterclaim against Davis, seeking various forms of injunctive and declaratory relief. This counterclaim was not acted upon by the superior court judge at the time he granted summary judgment for the defendants on plaintiff's complaint. As a result, the judge's decision on the summary judgment motion was not a "final judgment" under § 113.

Davis then appealed this matter to the First Circuit Court of Appeals (Docket No. 96-1650). On October 11, 1996, that Court affirmed the District Court judgment [Exhibit "J"]; and in its *Per Curiam* decision, noted that Davis had "suffered no injury from the alleged failure of the state court to assemble his record of appeal".

Once again, Davis sought certiorari of this decision to the United States Supreme Court (Docket No. 96-1074), which was denied on March 3, 1997 [Exhibit "K"], as was Davis' Motion for Rehearing of that denial [Exhibit "L"].

More recently, Davis has attempted to revive the earlier dismissed action against Lauria [sic]. On May 7, 1997, Davis filed a Motion for Scheduling Trial Date in the BMC, but the BMC denied his Motion. Davis subsequently retransferred this matter to the Suffolk County Superior Court. On August 22, 1997, the Suffolk County Superior Court, upon Motion by the defendant, vacated the retransfer, holding that the BMC was not authorized to revive the earlier action. On September 12, 1997, Davis filed a Notice of Appeal of the Suffolk County Superior Court decision.

Plaintiff's instant complaint [attached as Exhibit "M"] is at least the third in a series of actions against this defendant. It is, in sum and substance, precisely the same action as the 1993 Norfolk Superior Court action [Exhibit "A"], which was resolved on pre-trial Motions in favor of the defendant.

In substance, this new complaint alleges:

1. unfair and deceptive business practices;

2. some sort of undefined discrimination against the disabled;

3. undefined violations of M.G.L. c. 19A, § 14.

Indeed, that is how the plaintiff himself has defined his claim in his Motion in opposition to Vacate Retransfer to Superior Court [Exhibit "N"].

The balance of plaintiff's complaint is repetitive of the above allegations or is unintelligible, unrecognizable allegations – i.e. "swindled monies"; and "Crimes Against the Disabled".

Regardless how it might be interpreted, this complaint is no more than a restatement of two earlier complaints against this same defendant.

Of necessity, Hanover was obligated to prepare and file appropriate documents in opposition to each of these complaints, appeals, requests for further review, petitions for certiorari, and rehearing motions filed by Davis in all three actions.

It must be noted that Hanover has repeatedly offered to pay Davis the $20,000 settlement. After repeated court pleadings and filings, Hanover even agreed to be responsible for Davis' original attorney's lien, beyond the $20,000 settlement directly to Davis. Davis has refused all such offers.

ARGUMENT

I. NO M.G.L. c. 93A DEMAND LETTER

Although Davis makes some allegation in his complaint that he has "issued a 30 day letter to the defendant pursuant to Massachusetts General Laws c. 93A", Hanover has no information that any such letter was ever sent or received.

This so-called 30 day demand letter has been held to be a jurisdictional prerequisite to the entertaining of suit under M.G.L. c. 93A. *Spring v. Geriatric Authority*, 394 Mass. 274, 287 (1985). A demand letter must describe the

specific unfair practices claimed and list the damages suffered. *Fredericks v. Rosenblatt*, 40 Mass.App.Ct. 713, 716-717 (1996).

Since no statutory demand letter was sent, Hanover is entitled to a dismissal of any claims brought pursuant to M.G.L. c. 93A.

II. RULE 12(b)(6) MOTION TO DISMISS GOVERNING LAW

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must take the allegations of the complaint, as well as any inference which can be drawn from those allegations in the plaintiff's favor, as true. *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426,429 (1991). The complaint should be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Nader v. Citron*, 372 Mass. 96,98 (1977), quoting *Conley v. Gibson*, 355 U.S. 41,45-16 [sic] (1957). See also *Charbonnier v. Amico*, 367 Mass. 146,152 (1975); *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85,89 (1979); *Orion Insurance Co. PLC v Shenker*, 23 Mass.App.Ct. 754,757-758 (1987).

It is the defendant's contention, based on the following arguments, that there is no set of facts which the plaintiff could prove in support of any of his claims which would entitle him to relief; and that defendant is, therefore, entitled to entry of dismissal of each of those claims.

III. DISMISSAL UNDER RULE 12(b)(6) IS PROPER

This matter is altogether appropriate for dismissal under Rule 12(b)(6). See *Harvard Community Health Plan, Inc. v. Zack*, 33 Mass.App.Ct. 649, 652 (1992) (holding that the trial judge had not been required to dismiss the complaint for res judicata under 12(b)(6); but, holding, by implication, that the trial judge has authority to do so).

In *Yentile v. Howland*, 26 Mass.App.Ct. 214 (1988), the Appeals Court said it was proper to dismiss a matter under rule 12(b)(6) where a party had not raised the current issue in a previous action in the Land Court between the same parties involving the same agreement.

> The "salutary and well established rules against claim splitting which are now comprehended within rule 12 (b)(9)," *Keen v. Western New England College*, 23 Mass. App. Ct. 84, 87 (1986), and cases there cited, preclude the Yentiles from attempting in, a pending *or subsequent action* to undermine the Land Court judgment establishing the validity of the option. They may not raise a claim in the Superior Court which was available as a defense in the Land Court action.

Id. at 216.

See also, *Saisi v. Board of Trustees of State Colleges*, 6 Mass.App.Ct. 949 (1978):

> There is no merit in the plaintiff's contention that the defendant's motion for dismissal under Mass.R.Civ.P. 12(b)(6), 365 Mass. 755 (1974), was a procedurally improper vehicle for asserting the defense of res judicata. "The use of the Rule 12(b)(6) motion to raise the defense of former adjudication was not objectionable here as the

> materials for decision were official records available and not subject to dispute that could be read together with the complaint." *Osserman v. Jacobs*, 369 Mass. 200, 201 n. 3 (1975). As the prior adjudication relied on by the defendant was decided by the same court sitting in the same county as the present action, it cannot be seriously doubted that the records of the earlier one were "available" to the judge.

Further, the fact that the earlier action was terminated by summary judgment, rather than trial, does not prohibit application of res judicata principles. See *Saint Louis v. Baystate Medical Center, Inc.*, 30 Mass.App.Ct. 393 (1991), applying res judicata principles where the earlier action had not gone to trial, but had been dismissed with prejudice.

> [I]t is settled that a summary judgment, entered as was the one in the first action, will have preclusive effect.

Fluhr v. Allstate Insurance Company, 15 Mass.App.Ct. 983, 984 (1983).

And see *Wright Machine Corp. v Seaman-Andwall Corp*, 364 Mass. 683, 693 (1974) ("Federal and state courts have held overwhelmingly that a summary judgment operates as a binding adjudication of a claim when it is based on a court's determination that no genuine dispute exists as to any material fact and the moving party is entitled to judgment as a matter of law").

IV. RES JUDICATA

(Issue Preclusion and/or Claim Preclusion)

It is clear that when placed side-by-side, the allegations of the current complaint against Hanover [Exhibit "M"] are, in essence, the same as those made in Davis' original 1993 complaint [Exhibit "A"]. They both allege unfair and deceptive business practices (M.G.L. c. 93A) and they both apparently allege some form of discrimination against the elderly and the disabled. Indeed, that is the sum and substance of Davis new complaint.

As such, this complaint, in its entirety, is subject to dismissal under principles of res judicata.

Issue Preclusion:

Under the doctrine of issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim.

Microwave Antenna Systems & Technologies, Inc. v Whitney Pehl Construction Co., 23 Mass.App.Ct. 25,29 (1986) – citing Restatement (Second) of Judgments, § 27 (1982).

> Issue preclusion is the modern term for the doctrine traditionally known as "collateral estoppel", and prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies.

Bagley v. Moxley, 407 Mass. 633, 636-637 (1990).

> The essential elements necessary to preclude relitigation of an issue are identity of cause of action and issues, the same parties, and judgment on the merits by a court of competent jurisdiction.

Almeida v. Travelers Insurance Co, 383 Mass. 226, 229, 418 N.E.2d 602 (1981).

In the instant matter, these are the same parties and there has been a judgment on the merits by a court of competent jurisdiction.

Unquestionably, issue preclusion (as well as claim preclusion) applies to prohibit Davis' current claims of M.G.L. c. 93A violations and some form of age discrimination (or exploitation). These exact issues were squarely presented in his earlier action and were resolved against him.

Further, even the convoluted claim of some form of discrimination against the disabled must also be dismissed, because:

1. the allegations arise from the same set of circumstances as underlaid his 1993 action – since Hanover had an obligation to honor the attorney's lien insofar as M.G.L. c. 93A and age discrimination claims are concerned in the 1993 action (thereby negating any liability under those theories), that same obligation prohibits any alleged liability for whatever acts against a disabled may be alleged here;

2. case law is clear that even if a different theory is used, the same claim is still precluded;

3. case law is also clear that it should have been raised before; therefore it is precluded.

The court in *Almeida* noted that "even if the causes of action are not identical, under the doctrine of issue preclusion, as under the doctrine of collateral estoppel, the decision of the board **is conclusive as to previously litigated issues essential to the decision**". *Id.* at 230 (emphasis added).

Claim Preclusion:

> Claim preclusion is the modern term for the doctrines traditionally known as 'merger' and 'bar', and prohibits the maintenance of an action based on the same claim that was the subject of an earlier action between the same parties or their privies.

Bagley v. Moxley, supra at 636.

And see *Heacock v. Heacock*, 402 Mass. 21, 23 (1988) (the doctrine of claim preclusion makes a valid, binding judgment conclusive on the parties and prevents further litigation of all matters that were or should have been litigated in the prior action); *Gloucester Marine Railways v. Charles Parisi*, 36 Mass.App.Ct. 386, 391 (1994) (holding that "claim preclusion bars not only relitigation of all matters decided in a prior proceeding but those that could have been litigated as well . . . [t]his is so even though a party is prepared in a second action to present different evidence or legal theories to support his claim or seeks different remedies").

With regard to the instant claim by Davis, he is alleging, once again, that:

1. defendant "engaged in acts of unfair and deceptive business practices" – compare to complaint in 93-00574, Count III [Exhibit "A"], alleging defendant's acts "were unfair and deceptive within the meaning of M.G.L. c. 93A";

2. defendant "engaged in acts of Financial Exploitation of a senior citizen" – compare to complaint in 93-00574, Count IV, alleging "[t]he plaintiff is a senior citizen", and "[t]he defendants acts are also being used to harass, hurt and harm the plaintiff"; and

3. defendant "swindled monies from the plaintiff" compare to complaint in 93-00574, Count IV, that defendant "wants to cheat the plaintiff out of monies that are due him".

Even if there are new remedies being sought (i.e., some vague statement about the plaintiff's disability), they clearly spring from the same series of events.

> Two claims are the same for purposes of the doctrine of res judicata when they grow out of the same transaction, act, or agreement, and seek redress for the same wrong.

St. Germaine v Pendergast, 416 Mass. 698, 705 (1993) (O'Connor, concurring).

St. Germaine, id. at 706, cites the Restatement (Second), of Judgments § 24 (1982), to the effect that: "a claim extinguished by the doctrine of res judicata includes **all rights of the plaintiff to remedies against the defendant** with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose" (emphasis added).

One of the express purposes of the claim preclusion doctrine is to foreclose the litigation of all matters that should have been litigated in the first action. *Bendetson v. Building Inspector of Revere*, 36 Mass.App.Ct. 615, 618 (1994)

> The purpose of the rule is to prevent the splitting of a cause of action where the party to be precluded had both the opportunity and the incentive to litigate the matter fully in the first lawsuit.

Even a cursory view of the 1993 and 1997 complaints demonstrates that there is nothing in the 1997 complaint which Davis did not have both the opportunity and the incentive to litigate in the earlier complaint.

> . . . when an issue of fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action *between the parties*, whether on the same or a different claim.

Martin v. Ring, 401 Mass. 59,61 (1987) (emphasis added).

What is clear is that the summary judgment in the first case definitively held that Hanover was justified in not paying Davis the settlement draft without honoring the attorney's lien. The court based its judgment on Hanover's Memorandum "in its totality" and that was a central point of Hanover's argument. The propriety of Hanover's conduct was determined by the earlier actions and those prior judgments preclude any further action to litigate that question, even on a different claim. No matter what Davis alleges about some discrimination

towards him due to an alleged disability, Hanover's justification for its actions has already been decided as a matter of fact and law.

To the same effect, see *Heacock v. Heacock*, 402 Mass. 21, 23-24 (1988) ("This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies").

This preclusive effect of findings in a prior proceeding is also applied where the claims in the two proceedings are "sufficiently related", and "no other circumstances existed which warranted relitigation of the issues." *Corrigan v. General Electric Co.*, 406 Mass. 478, 479-480, 548 N.E.2d 1238 (1990).

Clearly, no circumstances exist in the instant complaint to warrant relitigation.

V. SANCTIONS

At a minimum, this matter is appropriate for the granting of relief, in the way of sanctions, under M.G.Z. c. 231, § 6(f), for attorney's fees, costs and expenses, including those expenses generated in the entire series of meritless complaints, commencing with the Norfolk Superior Court action (Docket No. 93-00574). Those earlier cases, and the instant one, are all "insubstantial, frivolous and not advanced in good faith" [M.G.L. c. 231, § 6(f)].

Given the litany of meritless, harassing, frivolous, and vexatious lawsuits generated by plaintiff against

Hanover, this Court should further exercise its discretion to order it to cease.

These law suits have occasioned Hanover to expend significant amounts of money in expenses, costs and attorney's fees in its defense (see attached Affidavit of George Suslak). There never has been the slightest merit to any of Davis' claims against Hanover. It is obvious that sanctions, including the enjoining of Davis from commencing any similar such suits in the future, is the only method of reasonably insuring that this activity by Davis will cease.

There are circumstances in which it is appropriate to order injunctive relief, enjoining the institution of further law suits against a defendant. See *Steinberg v. McKay*, 295 Mass. 139 (1936):

> The litigation instituted by the present defendant is not only without merit, but is part of a systematic harassment of the plaintiff by groundless suits. The case calls for equitable relief.

Id. at 143.

Rejecting the suggestion that it would be adequate to allow the defendant to seek dismissal in any future suits, the *Steinberg* opinion also noted, *id.* at 143-144:

> But this is not an adequate remedy, for the plaintiff is entitled to complete and immediate freedom from vexation by the defendant.

Such injunctive relief is also appropriate where, as in the instant case, it is clear that Davis would be entirely

"undeterred by the threat of liability under G.L. c. 231, § 6(f)". *Brookline v. Goldstein*, 388 Mass. 448 n. 6 (1983).

Dated: 9/29/97

/s/ George R. Suslak
Attorney for Defendant
George R. Suslak, Esquire
BBO #541921
STANTON & LANG
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940
(617) 595-1440

COMMONWEALTH OF MASSACHUSETTS

NORFOLK,SS. DEDHAM SUPERIOR COURT
CIVIL BUSINESS
CIVIL ACTION NO. 97-01716

FRED DAVIS,
Plaintiff

vs.

HANOVER INSURANCE COMPANY,
Defendant

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) AND MOTION FOR SANCTIONS

Now comes the plaintiff, Fred Davis, in the above-cited action and without waiver of Plaintiff's Judgment Against the Defendant, Hanover Insurance Company, moves the court to strike defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) and Motion for Sanctions.

Defendant's motion does not comply with Rule 9A and Rule C.

Defendant's motion is done in bad faith with the actual intent to deceive and fraud the court.

Defendant's motion is a continuing attempt to Financial Exploitation of the plaintiff.

Defendant's motion is done with the intent to deprive the plaintiff of his Constitutional Rights and Massachusetts Declaration of Rights.

Defendant's motion is done to hurt and harm the plaintiff.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) AND MOTION FOR SANCTIONS

September 29, 1997, the defendant hand delivered their Motion to Dismiss pursuant to Rule 12(b)(6) and Motion for Sanctions to the Clerk of the Dedham Superior Court, ***see*** **attached plaintiff's EXHIBIT "A".**

The defendant did not comply with Rule 9A and 9C.

Rule 9A moving party must first served a copy of the motion to the other party, then if the motion is opposed the opposition and the motion is filed in the court. The defendant did not comply with this rule.

Rule 9C a conference is required before the motion is sent to the other party to see if the matter could be resolved rather than filing of a motion. The defendant did not comply with this rule.

The defendant did not comply with Rule 9A and 9C, therefore their motion must be stricken.

The defendant, Hanover Insurance Company is acting in bad faith by telling falsehoods to the Court, stating they did not receive a 93A letter. Hanover was sent a letter by the plaintiff outlining demand in accordance with 93A.

The defendant, with actual intent is misleading and deceiving the court with issues that are irrelevant to this action. Defendant is obstructing justice with these irrelevant issues to mislead, fraud and deceive the court, **SEE:** ***GROH V. VIGLET*** 34 Ohio Law R 132 "an act done with actual intent to mislead or deceive another is an act in bad faith", ***SEE: HILGENBERG V. NORTHRUP*** 33 N.E. 786,787,134 Ind 92 "Bad faith and fraud are synonymous.

Plaintiff's action does state a claim, moreover, "Failure of the Complaint to set forth specific facts to support its general allegation was not a sufficient ground for dismissal of the suit, since the rules of Civil Procedure do not require to set out in detail the facts upon which he bases his claim **SEE:** ***CONLEY V. GIBSON*** 355 U.S. 14. ***SEE CF. MATY V. GRASSELLI CHEMICAL CO.,*** 303 U.S. 197 Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Defendant's motion is a continuing attempt to Financial Exploitation of the plaintiff who is elderly and a senior citizen.

The plaintiff is disabled unable to work. The defendant has clearly fortified the facts that they are further Financial Exploitation a senior citizen by submitting a fraudulent bill which is not itemized.

The defendant has taken the life out of the plaintiff, he is unable to go any where by himself, he is unable to take care of himself and he needs constant care.

It is a terrible thing that the defendant has done to the plaintiff.

The defendant is also attempting to deprive him of this Constitutional Rights amendments V and XIV due process of law and equal protection of law.

Massachusetts Declaration of Rights Article XI: which states in pertinent part: "Every subject of the Commonwealth ought to find a certain remedy, by have recourse to the laws, for all injuries or wrong which he may receive in his person, property or character, He ought to obtain right and justice freely . . . . ".

The defendant's motion was done to harass, hurt and harm him it is a sin to do these things to a elderly disabled person.

WHEREFORE, the plaintiff moves the court to strike the defendant's motion and grant him the relief as set forth in his complaint.

By,

/s/ Fred Davis
Fred Davis, Plaintiff
P.O. Box 721
Everett, Ma 02149

CERTIFICATE OF SERVICE

I, Fred Davis, certify that I mailed a true copy of the foregoing document to: George R. Suslak Stanton & Lang 200 Broadway Lynnfield, Ma 01940 postage prepaid.

Date 10-6-97 /s/ Fred Davis

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 97-01716

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SANCTIONS

INTRODUCTION

On January 20, 1998, this case was before the court for hearing on the motion of the defendant, Hanover Insurance Company ("Hanover"), to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) and for sanctions pursuant to G.L. c. 231, § 6(f). In support of its motion, Hanover argues that the complaint must be dismissed because the plaintiff, Fred Davis ("Davis"), can prove no set of facts in support of his claim which would entitle him to relief; and thus, the complaint should be dismissed for failure to state a claim.

In his opposition, Davis argues that Hanover's motion should be stricken because (1) it does not comply with rule 9A and 9C; (2) it is brought in bad faith and with actual intent to deceive and defraud the court; (3) it is a continuing attempt to financially exploit him; (4) it is brought with the intention to deprive him of his rights under the United States and Massachusetts Constitutions; and, (5) it is brought to hurt and harm him.

For the reasons set forth below, the defendant's motion to dismiss will be **ALLOWED.**

BACKGROUND

This matter stems from an automobile accident which allegedly occurred on February 11, 1987.[1] Taking the facts in the light most favorable to Davis, they are as follows: Davis is a partially disabled senior citizen residing in Malden, Massachusetts. Hanover is an Insurance Company with an office in Braintree, Massachusetts.

On or about January 18, 1990, Davis filed a complaint in the Suffolk Superior Court against Anthony Lauria ("Lauria"), the driver of a vehicle involved in the accident referred to above. At that time, Hanover was the insurer for Lauria. On February 12, 1991, the matter was remanded to the Boston Municipal Court ("BMC") and a trial was scheduled for October 9, 1991. On October 9, 1991, however, the case was reported settled and an order entered that the case would be dismissed as to all claims on November 12, 1991, unless the parties filed an agreement for judgment. Because no agreement for judgment was filed, the case was dismissed, as ordered, on November 12, 1991.

Sometime in 1991, however, a settlement was reached between Davis and Hanover in the amount of $20,000.00. Before the settlement was final, Davis, previous lawyer in this case, Stuart Ravech, served the parties with a notice

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[1] For a complete understanding of this decision, the court recites the lengthy procedural history gleaned from the record in this case.

of an attorney's lien. As a result, Hanover insisted that any settlement include the name of Stuart Ravech.

In 1993, Davis filed a lawsuit in Norfolk Superior Court against Hanover to collect the entire $20,000.00 settlement amount. In that complaint Davis alleged that Hanover breached its contract with him, engaged in unfair and deceptive business practices within the meaning of G.L. c. 93A, tried to cheat him out of money due to him, and acted in a manner designed to harass, hurt and harm him. At that time, Hanover again offered to pay Davis the settlement amount of $20,000.00 subject to an attorney's lien filed by Stuart Ravech; and, filed a counter claim against Davis seeking declaratory and injunctive relief. Subsequently, Hanover filed a motion for summary judgment. The motion was allowed in its totality.

Davis then attempted to appeal the matter to the Massachusetts Appeals Court. However, the Superior Court record could not be assembled because Hanover's counterclaim had not been resolved. Subsequently, Hanover voluntarily dismissed its counterclaim. On June 14, 1996, the Appeals Court affirmed the judgment of the Superior Court.

At that point, Davis sought further appellate review by the Supreme Judicial Court, which was denied on July 24, 1996.

Next Davis filed a petition for writ of certiorari with the United States Supreme Court, which was denied on January 6, 1997. A motion for rehearing, was denied by the United States Supreme Court on February 18, 1997.

On August 16, 1996, and while his original action was pending in the Norfolk Superior Court, Davis filed a complaint against Hanover and its Chairman of the Board, John F. O'Brien, in the United States District Court for the District of Massachusetts. This complaint sought injunctive and monetary relief stemming from alleged violations of state and federal constitutional rights as a result of Hanover's insistence that Davis' settlement was subject to the attorney's lien. On Hanover's motion, the U.S. District Court for the District of Massachusetts dismissed the complaint on May 17, 1996.

Davis then appealed the matter to the First Circuit Court of Appeals. On October, 11, 1996, that court affirmed the District Court judgment.

Davis next sought certiorari of the decision to the United States Supreme Court, which was denied on March 3, 1997. A motion for rehearing was subsequently denied by that court.

On May 7, 1997, Davis filed a motion for scheduling a trial date in the BMC with regard to the matter that was dismissed by that court on November 12, 1996. The motion was denied.

Subsequently Davis retransferred the matter to the Suffolk Superior Court. On Hanover's motion, that court vacated the retransfer.

On September 8, 1997, Davis filed the instant complaint in which he alleges that Hanover engaged in acts of unfair and deceptive business practices within the meaning of G.L. c. 93A, engaged in acts designed to

financially exploit him, and engaged in acts against the disabled in violation of G.L. c. 19A, § 14.

DISCUSSION

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any inferences which can be drawn therefrom in the plaintiff's favor. *Fairneny v. Savogran Co.*, 422 Mass. 469, 470 (1996); *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991) and cases cited. A complaint is not subject to dismissal if it would support relief on any theory of law. *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979). All inferences should be drawn in the plaintiff's favor "so as to do substantial justice." *Ourfalian v. Aro Mfg. Co.*, 31 Mass. App. Ct. 294, 296 (1991). Thus, "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief." *Nader v. Citron*, 372 Mass. 96, 98 (1977).

After careful examination of the present complaint, this court finds that the instant action is substantially identical to the complaint brought by Davis, docket # 93-00575, on March 10, 1993. Thus, based on the doctrine of Res Judicata, the complaint must fail as to all counts.

The doctrine of res judicata encompasses the doctrines of claim and issue preclusion. See *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988). The applicable doctrine in this case, the doctrine of claim preclusion, makes a valid, final judgment conclusive on the parties and their

privies, and bars further litigation of all matters that were or should have been adjudicated in the action. See *Heacock*, 402 Mass. at 23, citing, *Franklin v. North Weymouth Co-op Bank*, 283 Mass. 275, 279-80 (1933), and cases cited. This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies. See *Mackintosh v. Chambers*, 285 Mass. 594, 596-97 (1934) and cases cited. Restatement (Second) of Judgments § 25 (1980). The claim is the same for res judicata purposes if it is derived from the same transaction or series of connected transactions. *Saint Louis v. Baystate Med. Center Inc.*, 30 Mass. App. Ct. 393, 399 (1991), citing, *Boyd v. Jamaica Plain Co-op Bank*, 7 Mass. App. Ct. 153, 163-64 (1979). The doctrine is a ramification of the policy considerations that underlie the rule against splitting a cause of action, and is based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit. *Foster v. Evans*, 384 Mass. 687, 696 (1981). It is settled that a summary judgment entered, as was the one in the first action, will have preclusive effect. *Fluhr v. Allstate Ins. Co.*, 15 Mass. App. Ct. 983, 984 (1983).

Clearly, the doctrine of res judicata, or claim preclusion, applies here where both actions are based on the same claim, the matter was decided on summary judgment against Davis and he had the incentive and the opportunity to fully litigate the matter at that time.

The instant complaint describes the same claims which were at the core of the first action, namely, that

Hanover engaged in unfair and deceptive business practices within the meaning of G.L. c. 93A, and engaged in acts designed to financially exploit him.

The claims that Hanover "violated crimes against the disabled by knowingly and willfully swindling monies from the disabled," and that Davis was "discriminated against and taken advantage of because of his disability," are both derived of the same transaction, namely, the failure of Hanover to pay to Davis the entire $20,000.00 settlement amount without accounting for the attorney's lien. There is nothing in the instant complaint that Davis did not bring, or could not have brought, in the previous action. Thus, this court finds that Davis cannot now resuscitate, before this court, a claim that he brought, or could have brought, in the earlier proceedings in the Norfolk Superior Court docket # 93-00574. Indeed, "public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and, that matters one tried shall be considered forever settled as between the parties." See *Wright Mach. Corp. v. Seaman-Andwall Corps.*, 364 Mass. 683, 688 (1974), quoting, *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931).

With regard to the motions of the plaintiff and the defendant for sanctions, no sanctions will be imposed at this time. However, the plaintiff has had full consideration of his complaint. Should the plaintiff, Fred Davis, bring another duplicative complaint against this defendant, Hanover Insurance Company, sanctions should be considered at that time.

ORDER

For the reasons stated above, it is hereby ***ORDERED*** that the motion of the defendant, Hanover Insurance Company, to dismiss be ***ALLOWED***. The defendants motion persuant [sic] to G.L. c. 231, § 6(f) for sanctions is ***DENIED***. The motion of the plaintiff, Fred Davis, for sanctions is ***DENIED***.

/s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Court

Dated: March 10, 1998.

A TRUE COPY

Attest: /s/ May A Parker 3/13/98
Deputy Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

98-P-1140

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

For substantially the reasons set forth in the Superior Court judge's memorandum of decision (A. 17-24) allowing the defendant's motion to dismiss on grounds of res judicata, we affirm. We call to the attention of the plaintiff the judge's warning that sanctions will be considered if the plaintiff brings another duplicative complaint against the defendant (A. 23-24).

Judgment affirmed.

By the Court (Jacobs, Gillerman & Lenk, JJ.),

/s/ Illegible
First Assistant Clerk

Entered: November 22, 1999.

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

George R. Suslak, Esquire
Stanton & Lang
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940

RE: Docket No. FAR-1111

FRED DAVIS
vs.
HANOVER INSURANCE COMPANY

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied. The motion to file application late is allowed.

Susan Mellen, Clerk

Dated: January 26, 2000

To: Fred Davis
George R. Suslak, Esquire

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
NO: 93-00574

FRED DAVIS,)
Plaintiff)
vs.)
HANOVER INSURANCE COMPANY,)
Defendant)

MOTION OF DEFENDANT, HANOVER INSURANCE COMPANY FOR SUMMARY JUDGMENT UNDER M.R.C.P. 56

(Filed Sep. 24, 1993)

Now comes the defendant, Hanover Insurance Company and [ ] moves this Honorable Court pursuant to Mass. R. Civ. P. Rule 56 (b) to enter summary judgment in favor of the Counts I-IV of plaintiff's Complaint as a matter of law.

An Affidavit, Memorandum of Law and exhibits are attached hereto.

Defendant
By its attorney,

/s/ Mark F. Mahnken
Mark F. Mahnken
DRISCOLL, GILLESPIE
& STANTON
200 Broadway
P.O. Box 850
Lynnfield, Mass. 01940
(617) 596-2200
BBO: #314-400

Dated: 8/25/93

1/14/94 – After hearing and upon considering all submissions, and the entire file, motion of Defendant, Hanover Insurance Company for Summary Judgment is ALLOWED in its totality. See: Defendant's memorandum affixed hereto

/s/ Thomas E. Connolly,
*JSC**

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*Italic was handwritten.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

95-P-1818

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The judgment is affirmed substantially for the reasons set forth in the brief of the defendant.

So ordered.

By the Court (Dreben, Gillerman & Laurence, JJ.),

/s/ Nancy Turck Foley
Clerk

Entered: June 14, 1996.

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse,
Boston, Massachusetts 02108
(617)-557-1020

George R. Suslak, Esquire
Driscoll, Gillespie & Stanton
200 Broadway
PO Box 850
Lynnfield, MA 01940

RE: Docket No. FAR-08597

FRED DAVIS

VS.

HANOVER INSURANCE COMPANY

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on July 24, 1996, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: July 24, 1996

To: Fred Davis
George R. Suslak, Esquire

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 6, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company
No. 96-640

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 18, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company
No. 96-640

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRED DAVIS, Plaintiff,	)	
v.	)	C.A. No. 95-cv-11837-MLW
HANOVER INSURANCE COMPANY, JOHN F. O'BRIEN, Chairman of the Board of Hanover Insurance, Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. May 17, 1996

On August 16, 1995, plaintiff Fred Davis filed this action seeking injunctive and monetary relief stemming from alleged violations of his state and federal constitutional rights. On September 5, 1996, the defendants filed a motion to dismiss the complaint. For the reasons stated herein, this motion must be ALLOWED.

I. The Complaint

According to his complaint, Mr. Davis brought claims of breach of contract and unfair trade practices against the defendants in Massachusetts Superior Court in 1993. The defendants moved for summary judgment on all counts of the plaintiff's state court complaint. This motion was subsequently allowed.

On January 21, 1994, plaintiff filed a notice of appeal with the Superior Court. Since that time, plaintiff has

filed five additional notices of appeal. According to the complaint, the Superior Court "has knowingly and willfully refused to assemble the record and forward it to the Massachusetts Court of Appeals." Plaintiff asserts further that "both Judge Thomas Connolly and the defendant's attorney will not allow the record to be assembled and go to the Appeals Court because they don't want this case to go to the Massachusetts Appeals Court." As a result of these purported activities, plaintiff claims "[v]iolations of State and Federal Constitutional Rights: Equal protection of the law. Obstruction of justice."

II. Analysis

Plaintiff has not stated a viable claim against the defendants in this case. First, the complaint does not identify any actions taken by the defendants which could have caused the plaintiff harm, constitutional or otherwise. The complaint speaks only of actions taken by the Superior Court and the defendants' lawyer.

Second, even if the complaint can be read to implicate the defendants, the constitutional claims cannot survive. It is well-established that the Fourteenth Amendment and the federal civil rights statute, 42 U.S.C. § 1983, are implicated only by action taken under color of state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *Lugar v. Edmondson Oil Co.*, 457 U.S 922 (1982). Defendants in this case are private actors. *See Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("[w]ith a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of

private entities.") It is conceivable that plaintiff could argue that the alleged actions of the defendants' attorney in "not allow[ing] the record to be assembled" are sufficiently intertwined with state processes so as to constitute the requisite state action. *See, e.g., Edmondson*, 500 U.S. at 618-28. Even so, this one-sentence allegation against the defendants' attorney is too vague and conclusory to allow this action to proceed under such a theory.

To the extent that plaintiff brings this action under the Massachusetts Civil Rights Act, M.G.L. ch. 12 § 11I, this claim must also be dismissed with prejudice. Although the Massachusetts Civil Rights Act covers purely private action, it requires some form of "threats, intimidation, or coercion." *See* M.G.L. ch. 12 § 11H. No "threats, intimidation, or coercion" by any of the defendants have been alleged in this case.

Finally, as an alternative ground for dismissing this action, it is clear that the plaintiff has suffered no constitutional injury by any failure of the Superior Court to assemble his record for appeal. Mr. Davis currently has no right to appeal the judgment against him in state court. Under M.G.L. c. 231 § 113, a party can appeal only a "final judgment of the superior court. . . . " In the Superior Court action, the defendants filed a counterclaim against Davis, seeking various forms of injunctive and declaratory relief. This counterclaim was not acted upon by the superior court judge at the time he granted summary judgment for the defendants on the plaintiff's complaint. As a result, the judge's decision on the summary judgment motion was not a "final judgment" under § 113. *See Litton Business Telephone systems, Inc. v. Scwartz,*

9 Mass.App.Ct. 847 (1980) (dismissing appeal "because the judgment entered . . . does not dispose of the counterclaim of the individual defendants"); *E.W. Foster Co. v. McLaughlin*, 7 Mass.App.Ct. 865 (1979) ("when there is an adjudication of the claims of fewer than all the parties, no judgment has yet been entered from which an appeal can be taken.") Accordingly, in the absence of a motion for entry of a final judgment under Mass.R.Civ.P. 54(b) or a petition for interlocutory relief under M.G.L. ch. 231 § 118, plaintiff must await resolution of the defendants' counterclaim before appealing the judgment against him.

Accordingly, for the foregoing reasons, the defendants' motion to dismiss is hereby ALLOWED.

/s/ Mark F. Wolf
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1650

FRED DAVIS,
Plaintiff, Appellant,

v.

HANOVER INSURANCE COMPANY, JOHN F. O'BRIEN, CHAIRMAN OF THE BOARD OF HANOVER INSURANCE COMPANY,
Defendants, Appellees.

JUDGMENT

Entered: October 11, 1996

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed.**

By The Court:

Clerk

[cc: Messrs. Davis & Suslak]

Per Curiam. As the record indicates, at the time the instant case was filed in federal district court no judgment had yet entered in state court on the counterclaim of defendants/appellees. Since all claims had not been adjudicated, plaintiff/appellant had no right at that time to appeal the judgment dismissing his action. *See Litton*

Business Telephone Systems, Inc. v. Schwartz, 9 Mass. App. Ct. 865, 865, 400 N.E.2d 281, 281 (1979) (dismissing appeal "because the judgment entered . . . does not dispose of the counterclaim"). Consequently, he suffered no injury from the alleged failure of the state court to assemble his record for appeal.

Affirmed.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

March 3, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company, et al.
No. 96-1074

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 14, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company, et al.
No. 96-1074

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk

COMMONWEALTH OF MASSACHUSETTS
BOSTON MUNICIPAL COURT

SUFFOLK, ss

CIVIL BUSINESS
No. T-41026

FRED DAVIS, PLAINTIFF

vs.

ANTHONY LAURIA,
DEFENDANT

PLAINTIFF'S MOTION TO REMOVE DISMISSAL JUDGMENT

Now comes the plaintiff, Fred Davis, in the above-cited action and requests the Court to remove dismissal judgment as this action was not settled.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REMOVE DISMISSAL JUDGMENT

May 7, 1997, the plaintiff filed with the Court Plaintiff's Motion For Scheduling Trial Date and Plaintiff's Motion To Amend Complaint.

These motions were to be placed on the Motion List to be heard on May 16, 1997.

However, when the plaintiff appeared in Court on May 16, 1997, his motions were not on the Motion List.

The plaintiff inquired in the Clerk's Office as to why his motions were not on the Motion List.

Plaintiff was informed that the case was settled.

This case has not been settled.

Therefore, the plaintiff requests the Court to remove the dismissal Judgment, in order that the plaintiff can move this action for trial.

Based on the foregoing the plaintiff requests the Court to allow his motion.

By,
/s/ Fred Davis
Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

HEARING NOTICE

The hearing on the foregoing motion will be heard June 6, 1997, at 9:00 A. M. at the Old Courthouse Room 394 Boston, Massachusetts.

CERTIFICATE OF SERVICE

I, certify that I mailed a true copy of Plaintiff's Motion To Remove Dismissal Judgment to: Frank Pietrasik, Hanover Insurance Company 35 Braintree Hill Office Park Suite 301 P.O. Box 9159. Braintree, Ma 02184 Certified Mail No. P 576 480 058.

DATE 5-7-97 /s/ Fred Davis

Commonwealth of Massachusetts

Suffolk, ss. Boston Municipal Court
No. T-41026

****

Fred Davis *
*
v. * Order
*
Anthony Lauria *

****

Plaintiff seeks to vacate a dismissal which entered in the Boston Municipal Court on November 12, 1991. A hearing on the motion was held on June 6, 1996.

The matter was previously scheduled for trial on October 9, 1991 and was reported settled on that date. Having been reported settled, an order entered on October 9, 1991 that the case was to be dismissed as to all claims on November 12, 1991, unless the parties filed an agreement for judgment before that date. Notice of this order was sent to the parties on October 9, 1991. No agreement for judgment was filed and the case was subsequently dismissed.

Nearly six years has passed since the dismissal entered. The plaintiff provides no excusable reason by way of affidavit for the delay in bringing this matter forward.

Accordingly, the motion is denied.

/s/ Patricia Bernstein

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO: SUCV90-00408C

FRED DAVIS,)
Plaintiff)
)
VS.)
)
ANTHONY LAURIA,)
Defendants)

DEFENDANT'S MOTION TO VACATE RETRANSFER TO SUPERIOR COURT

Now comes the defendant, Anthony Lauria, and hereby requests this court to vacate the July 7, 1997 retransfer of the above-captioned matter as the plaintiff's request for retransfer was untimely and the Boston Municipal Court lacked the power to retransfer this matter beyond the statutory time period.

FACTS

This is an action arising out of a motor vehicle accident which allegedly occurred on February 11, 1987. The plaintiff, Fred Davis ("Davis") filed a complaint against the defendant, Anthony Lauria ("Lauria") in Suffolk County Superior Court on or about January 18, 1990 (Exhibit A). This action was subsequently remanded to the Boston Municipal Court on February 12, 1991. (Exhibit B). The Boston Municipal court scheduled the case for trial on October 9, 1991. The case was reported settled to the Boston Municipal Court on October 9, 1991. (Exhibit C). An order entered on October 9, 1991 that the

case would be dismissed as to all claims on November 12, 1991, unless the parties filed an agreement for judgment. (Exhibit C) Notice of this order was sent to the parties on October 9, 1991. (Exhibit C). No agreement for judgment was filed, therefore, the case was dismissed as of November 12, 1991.

On or about May 19, 1997, nearly six years after the dismissal, Davis filed a Motion To Remove Dismissal Judgment (Exhibit D). On June 23, 1997, the Boston Municipal Court denied Davis' motion, noting that the case had been dismissed in November of 1991 and the plaintiff had provided "no excusable reason" for the delay in filing his motion.

On or about June 27, 1997, Davis filed his Request For Retransfer Back To The Superior Court. (Exhibit E). On or about July 7, 1997, this Court docketed the reactivation of this matter. (Exhibit F).

LAW

MGL ch. 231 s 102C governs the retransfer of cases to the Superior Court after a finding or a decision of the District Court. A request for a retransfer "shall be filed with the clerk of the district court within ten days after notice of the finding or decision." MGL ch. 231 s. 102C. If Davis desired to seek a retransfer of the case to the Superior Court, then he had ten days from notice of the decision or finding of the Court which dismissed this action. The papers of the Boston Municipal Court clearly indicate that the Court's decision to dismiss the plaintiff's claim was made on October 9, 1991. The papers also show that the plaintiff had notice of this order. According to

MGL ch. 233 s. 102C, Davis had until October 19, 1991 within which to file his request. No such request for retransfer was filed.

Arguably, the plaintiff could contend that the ten day time period did not commence until November 12, 1991, by which date the parties could have filed an agreement for judgment. Assuming *arguendo*, that the Court adopts this position, then the plaintiff would have had until November 22, 1991 to file his request. Again, no such request was filed.

On June 27, 1997, almost six years after the Court's order of dismissal, Davis finally filed his request for retransfer. Obviously, Davis is attempting to revive the time within which to file a request for retransfer by filing a groundless motion to remove the earlier dismissal simply to obtain a Court order, from which he could then attempt to retransfer this claim.

The decision which terminated the case of *Davis v. Lauria* was issued on October 9, 1991. The plaintiff can not be allowed to create a new window of opportunity to retransfer the case merely by filing a motion to remove the dismissal, years beyond the statutory deadline for such requests.

Given the fact that the plaintiff's 1997 request for retransfer was untimely, the Boston Municipal Court had no authority to order a retransfer and the judgment of dismissal should not be disturbed. *Griffin v. Powers*, 1 Mass. App. 846, 301 N.E.2d 691 (1973).

In *Powers*, after a trial, the Court entered a finding for the plaintiff on June 11, 1970. Judgment for the plaintiff

entered on June 26, 1970. The defendant apparently never received notice of the entry of judgment, therefore, he did not timely file a request for retransfer to the Superior Court within the ten day time period. Upon the defendant's motion, the Court allowed the defendant's request to vacate the June 26, 1970 judgment as long as the defendant posted a bond by December 4, 1970. The defendant timely filed the required bond, therefore, effective December 4, 1970, a new judgment for the plaintiff entered. The defendant had ten days from December 4, 1970 to file his request for retransfer, which he did not file.

On January 27, 1972, the defendant filed his request for a retransfer, which request was allowed. The plaintiff thereafter moved to vacate the retransfer on the grounds that it was not timely filed. The Appeals Court agreed, holding that the District Court "had no authority, after the ten days had elapsed, to order retransfer." *Id.*

More recently, it has been confirmed that a District Court has no authority to permit retransfer after the expiration of the ten day time period. *Barrett v. Lynn Ladder & Scaffolding Co., Ind.*, 1994 Mass. App. Div. 217.

As is the case with the claim before the Court today, Davis failed to file his request for transfer in a timely fashion. Therefore, the District Court had no authority to order the retransfer. To allow a party to escape the ten day requirement by simply filing a motion five, ten or, perhaps, twenty years later would defeat the purpose of MGL ch. 233 s. 102C and litigation could never be considered final and completed.

SUMMARY

Based upon the above, the defendant respectfully requests that this Court vacate the Boston Municipal Court's retransfer order to this Court.

By defendant's attorney,

George R. Suslak, Esquire
STANTON & LANG
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940-2314
(617) 595-1440
BBO#: 541921

Dated: _____

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK
THE SUPERIOR COURT

DOCKET # SUCV90-00408C

FRED DAVIS, Plaintiff
vs.
ANTHONY LAURIA,
Defendant

PLAINTIFF'S MOTION IN OPPOSITION TO VACATE RETRANSFER TO SUPERIOR COURT

Now comes the plaintiff, Fred Davis, in the above-cited action and opposes the defendant's Motion to Vacate Retransfer to Superior Court as the defendant's motion was done in bad faith, Defendant's Motion does not comply with Massachusetts Rules of Civil Procedure and Mr. Suslak violated his Attorney's Oath Massachusetts General Law 221 section 38 by committing falsehood to the Court. There are violations of deceptive practices, Crimes against the disabled and Massachusetts General Laws Chapter 19A § 14 "Financial Exploitation".

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN OPPOSITION TO VACATE RETRANSFER TO SUPERIOR COURT

Pursuant to Massachusetts Rules of Civil Procedure prior to filing a Motion the moving party must confer with the party before filing a motion, however, this was

not the case Mr. Suslak merely sent the motion to the plaintiff without conferring with him, which is a violation of the Massachusetts Rules of Civil Procedure and must be stricken.

The defendant is acting in bad faith and his attorney is violating his Attorney's Oath which states in pertinent part:

ATTORNEY'S OATH

"YOU _____ SOLEMNLY SWEAR THAT YOU WILL DO NO FALSEHOOD, NOR CONSENT TO THE DOING OF ANY IN COURT."

June 6, 1997, the plaintiff appeared in the Boston Municpal [sic] Court on Plaintiff's Motion To Remove Dismissal Judgment, the Court denied the plaintiff's motion and the plaintiff filed a timely Motion to Retransfer to the Superior Court and Plaintiff was notified of that transfer on July 7, 1997.

Therefore, when Mr. Suslak informs the Court that plaintiff's transfer is not timely he is committing a falsehood to the Court.

There is no evidence in the Court's record that the case was settled by plaintiff's attorney Robert Abrams nor by the plaintiff Fred Davis.

The mere fact that there is an entry on the docket sheet has no bearing on the case, since there is no evidence to substantiate the action was settled.

The defendant and his attorney are using deceptive business practices and crimes against the disabled to cheat the plaintiff out of monies.

In addition plaintiff is an elderly person and the defendant and his attorney is using "Financial Exploitation" to cheat the plaintiff from monies which is a violation of Massachusetts General Laws Chapter 19A § 14.

The bottom line is that the defendant and his attorney are continuing to harass and hurt the plaintiff as the plaintiff is disabled because of the defendant.

Mr. Suslak in his motion page 1 as (Exhibit A). however, there is no Exhibit A affixed to his motion Page 1 (Exhibit B) page 1 (Exhibit C) page 2 (Exhibit D) page 2 (Exhibit E) page 2 (F) as previous stated none of these Exhibits were furnished to the plaintiff. There is no Certificate of Service.

Therefore, the facts clearly reveal that Mr. Suslak is not being honest and is hiding the true facts of the case.

Wherefore, the plaintiff moves the Court to deny the defendant's motion and schedule this action before a jury as soon as possible.

By,

Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

CERTIFICATE OF SERVICE

I certify that I mailed a true copy of Plaintiff's Motion In Opposition to Vacate Retransfer To Superior Court and Memorandum in Support to Plaintiff's Motion In Opposition to Vacate Retransfer to Superior Court to: George Suslak Stanton & Lang P.O. Box 1080 Lynnfield Woods

Office Park 200 Broadway US Route 1 South Lynnfield, Ma 01940-2314 certified Mail No. P 576 480 131 postage prepaid.

7-23-97

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Notice sent 8-26-97

FD-PRO-SE
MFM
CPF
STE
LA

SUPERIOR COURT
CIVIL ACTION
No. SUCV90-00408-C

FRED DAVIS,

Plaintiff

v.

ANTHONY LAURIA,

Defendant

COURT ORDER ON DEFENDANT'S MOTION TO VACATE RETRANSFER TO SUPERIOR COURT

After consideration of defendant's motion and plaintiff's opposition, the defendant's Motion to Vacate Retransfer to Superior Court is **ALLOWED**. In this court's view, the Boston Municipal court had no authority after they denied plaintiff's motion to remove the 1991 dismissal of this case to then order it retransferred to the Superior Court. The plaintiff's right to obtain that retransfer ended on November 22, 1991, i.e. ten days after the case was dismissed in the Boston Municipal Court on November 12, 1991.

The decisions of the Appellate Courts make it clear that plaintiff cannot revive this old case by seeking retransfer many years after it's life ended, and the right

to claim retransfer ran out, in the Boston Municipal Court. See *Griffin v. Powers*, 1 Mass. App. 846, 301 N.E. 2d 691 (1973) and *Barrett v. Lynn Ladder and Scaffolding Co.*, 1994 Mass. App. Div. 217.

/s/ John C. Cratsley
John C. Cratsley
Justice of the Superior Court

DATED: August 22, 1997

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

97-P-2327

FRED DAVIS

vs.

ANTHONY LAURIA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The pro se plaintiff appeals from a Superior Court order allowing the defendant's motion to vacate an order retransferring this matter from the Boston Municipal Court. In essence, the plaintiff seeks to revive the underlying motor vehicle tort action which was reported settled in 1991. For the reason, if no other, that principles of res judicata preclude the plaintiff from asserting that there was no settlement of this action by our decision in *Davis v. Hanover Ins. Co.*, 40 Mass. App. Ct. 1127 (1996), cert. denied, 117 S. Ct. 685 (1997),[1] and thus that retransfer to the Superior Court would be futile, we affirm.

Order allowing motion to vacate retransfer affirmed.

---

[1] In the earlier case, we affirmed a summary judgment for the insurer on Davis's complaint alleging breach of the settlement agreement. The agreement is evidenced by a written release dated September 20, 1991, which Davis executed, purporting to release the present defendant and the insurer of all claims by Davis arising out of the motor vehicle accident giving rise to the instant action.

By the Court (Greenberg,
Gillerman & Rapoza, JJ.),

/s/ Cris G. Micchia
Asst. Clerk

Entered: February 10, 1999

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS

SJC NO. _____
AC NO. 97-P-2327

FRED DAVIS,
Appellant

vs.

ANTHONY LAURIA
HANOVER INSURANCE COMPANY,
Appellees

APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

For reasons set forth in this application, Fred Davis, Appellant requests that the full Supreme Judicial Court review the February 10, 1999, decision of the Appeals Court in this matter.

II. STATEMENT OF PRIOR PROCEEDINGS

The plaintiff-appellant, Fred Davis is a senior citizen residing at 353 Bryant Street Malden, Massachusetts.

Anthony Lauria, Hanover Insurance Company's insured, negligently operated a motor vehicle causing a motor vehicle accident, in which Hanover Insurance Company admits liability.

The appellant received severe bodily injuries resulting in partial permanent disability because of this accident.

The appellant has been unable to work, due to the accident, and has lost approximately $46,000.00, in wages, which resulted in the loss of his employment.

In addition, there was excessive damage to the appellant's motor vehicle and large medical bills.

Appellant is unable to work and needs constant care.

The appellees committed crimes against the disabled and violated Massachusetts General Laws Chapter 19A § 14, using "Financial Exploiation [sic]" to cheat the appellant from monies due him.

Appellees have used means of fraud and lied to the Appeals Court as their defense.

May 7, 1997, appellant filed his Motion For Scheduling Trial Date (app. p. 5) and Plaintiff's Motion To Amend Complaint (app. p. 6). these motions were to be placed on the motion list to be heard on May 16, 1997, the appellees did not oppose these motions (app. p. 4).

The appellant appeared in court on May 16, 1997, however, his motions were not on the motion list.

The appellees did not appear in court for the scheduled hearing of these two motions.

The appellant inquired in the Clerk's Office as to why his motions were not on the motion list.

Appellant was informed that the case was settled, however, that was not the truth.

The case was never settled and the docket sheet clearly shows that fact, no notices were sent, nor is there a name of an individual who reported it settled (app. p. 2), moreover, there is no document in the case file to substantiate, the fact that the case was settled.

Appellant filed Motion To Remove Dismissal Judgment (app. p. 10). There was no opposition from the appellees (app. p. 9). The district court denied this motion.

Appellant filed Request For Retransfer Back to the Superior Court (app. p. 14).

Appellees filed Motion To Vacate Retransfer to the Superior Court. Appellant filed his Motion in Opposition To Vacate Retransfer to the Superior Court (app. p. 15).

Appellant filed Plaintiff's Motion For Sanctions Against George R. Suslak For Telling Falsehoods to the Court (app. p. 19). Appellees opposition was not timely, therefore was returned to the appellees.

The Superior Court allowed the defendants' Motion To Vacate Retransfer To the Superior Court (app. p. 22).

Appellant filed his Notice of Appeal.

The Appeals Court erred in its decision since it was based solely on falsehoods it obtained from the appellees along with statements of fraud.

Now the case is before this Honorable Court for Application For Further Appellate Review.

III. FACTS

The appellees admit liability in this action.

The action was not settled and appellant, Davis has not received one penny in this action.

Appellant was not notified that the action was settled by the court **SEE ATTACHED DOCKET ENTRY SHEET.**

Appellant was a victim of violation of M.G.L 19A Abuse of Elderly persons: "Financial Exploitation".

The Appeals court erred in its decision, since their decision was based solely on fraud, falsehoods and obstruction of justice, which the appellees, their attorney George R. Suslak furnished them.

Attorney George R. Suslak violated the Massachusetts Canon Rules, and Attorney's Oath.

IV. ISSUES PRESENTED TO SUPREME JUDICIAL COURT

Appellant is requesting review of the Appeals Court's decision of February 10, 1999, based on Appellant's assertion the Appeal Court should have reversed the decision of the Suffolk Superior Court.

The decision of the Appeals Court was based on errors of law, unsupported evidence, fraud, falsehoods, obstruction of justice and failure to address all issues that were presented for review.

V. ARGUMENT

A. APPEALS COURT ERRED IN LAW WHEN IT STATED THAT CASE WAS SETTLED

The case was not settled. The fact is clearly substantiated by evidence that there is no document in the court file that states the case was settled. There were no notices that were sent to the appellant, nor to any other party in this action **SEE ATTACHED DOCKET SHEET.**

In addition, there is no name of the individual who reported that the case was settled.

SEE GRIFFIN v. POWERS 301 N.E. 2d 691 the court allowed petition to vacate judgment because of the failure to receive notice of the original finding. Therefore, the appellant's Motion to Vacate Judgment should have been allowed, because if there was a finding he should have been notified.

Therefore, since the District Court denied appellant's motion it was appropriate for the District Court to transfer back the action to the Superior Court.

B. THE ACTS AND PRACTICES OF THE APPELLEE, HANOVER INSURANCE COMPANY WERE UNFAIR DECEPTIVE WITHIN THE MEANING OF M.G.L. CHAPTER 93A

Massachusetts General Law c. 176D § 3 § (9) f inserted by St. 1972, c 543 § 1, provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear". Massachusetts General Law c. 93A, § 2 (a) (inserted by St. 1967

C. 813 § (1), covers such insurance practices in its prohibition of "unfair or deceptive acts or practices in the conduct of any trade or commerce". **SEE DODD v. COMMERCIAL UNION INSURANCE COMPANY** 353 Mass at 78 "provides for recovery of up to three but not less than two times actual damages. . . . "

Hanover Insurance Company admits to liability, however, they are using means of fraud to inform the court that the case has been settled.

Hanover Insurance Company shows no evidence of a cancelled check that the case was settled, no cancelled check that medical bills were paid, no cancelled check that damage to the appellant's motor vehicle was paid.

The bottom line is the case was not settled.

C. THE APPEALS COURT ERRED IN STATING THERE WAS AN AGREEMENT EXECUTED

"BLACK'S LAW'S DICTIONARY "execute: "to do, to follow out according to the terms to fulfill the purpose".

The Appeals Court erred as an agreement was not executed, here again, the Appeals Court took the word of the appellees and their attorney George R. Suslak.

The appellees and their attorney George R. Suslak have lied to the Court the case was never settled because appellant was not paid.

Hanover Insurance Company have no evidence to show that agreement was executed, they have no evidence of a cancelled check, no evidence that medical bills

were paid, no evidence that damage to the appellant's motor vehicle was paid.

There is no evidence whatsoever, that appellant received one penny from the appellees.

D. THE COURT ERRED IN NOT PLACING PUNISHMENT AGAINST THE APPELLEES FOR VIOLATION OF MASSACHUSETTS GENERAL LAWS CHAPTER 19A § 14 "FINANCIAL EXPLOITATION" AGAINST AN ELDERLY PERSON

Massachusetts General Laws Chapter 19A "Financial Explitation": "an act or omission by another person, which causes a substantial monetary or property loss to an elderly person, which gain would otherwise benefit the elderly person".

Appellant is an elderly person and is a victim of Financial Exploitation by the appellees they have caused the appellant a gross monetary and property loss which gain would have benefit the appellant.

Their acts have caused the appellant a gross amount of medical bills leaving him with a permanent partial disability and is now unable to care for himself needing constant care.

The Appellees have caused the appellant lost wages in the amount of approximately $46,000.00, leaving him unable to work.

The appellees have used a cover-up to hide these acts by telling falsehoods to the court that the case has been settled.

E. THE APPEALS COURT ERRED IN NOT PLACING SANCTIONS AGAINST GEORGE R. SUSLAK FOR TELLING FALSEHOODS TO THE COURT

Canon Rules 1 –	Disciplinary Rules
DRI – 102	MISCONDUCT
(A)	A lawyer shall not:
(4)	Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5)	Engage in conduct that is prejudicial to the administration of justice.

GENERAL LAWS 221 section 38 ATTORNEY'S OATH

"You (name) solemnly swear that you will do no falsehood, nor consent to the doing of any in court" So help you GOD.

August 14, 1997, George R. Suslak engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation of the facts.

George R. Suslak made the following statement to the Court: "In support thereof, the defendants state that this action was settled years ago. . . . " This statement is false and Mr. Suslak was fully aware that this action has not been settled.

George R. Suslak has not shown any creditable evidence that the case was settled. He has not shown any

cancelled check that appellant was paid for his injuries, he has not shown any cancelled check that appellant's medical bills were paid, he has not shown any cancelled check that appellant's motor vehicle damages were paid.

The facts clearly reveal that Mr. Suslak has engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation. He has engaged in conduct that is prejudical [sic] to the administration of justice, which is in violation of the Canon Rules.

George R. Suslak has engaged in telling falsehoods to the court, which is in violation also of the Attorney's Oath.

Based on the facts and evidence the Appeals Court erred in not placing sanctions against George R. Suslak.

F. PUBLIC INTEREST IS INVOLVED

The public interest is in complete jeopardy, if the courts are going to accept the word of individuals, who are not telling the truth, without showing evidence that individuals were paid.

CONCLUSION

Appellant, Fred Davis, requests this Honorable Court to remand the action to the Suffolk Superior Court for trial before a jury, legal fees, costs and any other relief the Honorable Court deems appropriate.

RESPECTFULLY SUBMITTED,

/s/ Fred Davis
Fred Davis, Appellant
P.O. Box 721
Everett, Ma 02149

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Christopher P. Flanagan, Esquire
Stanton & Lang
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940

RE: Docket No. FAR-10421

FRED DAVIS

vs.

ANTHONY LAURIA

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: March 26, 1999

To: Fred Davis
Christopher P. Flanagan, Esquire

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 4, 1999

Mr. George R. Suslak
Stanton & Lang
200 Broadway, Ste. 102, Rte. 1
Lynnfield, MA 01940-2314

Re: Fred Davis
v. Anthony Lauria
No. 98-1867

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

Massachusetts Rules of Civil Procedure

RULE 12. DEFENSES AND OBJECTIONS – WHEN AND HOW PRESENTED – BY PLEADING OR MOTION – MOTION FOR JUDGMENT ON PLEADINGS

(a) When Presented.

(1) After service upon him of any pleading requiring a responsive pleading, a party shall serve such responsive pleading within 20 days unless otherwise directed by order of the court.

(2) The service of a motion permitted under this rule alters this period of time as follows, unless a different time is fixed by order of the court: (i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (ii) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted.

(7) Failure to join a party under Rule 19;

(8) Misnomer of a party;

(9) Pendency of a prior action in a court of the Commonwealth.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not

excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(9) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may after hearing order stricken from any

pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, or pendency of a prior action is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

MASSACHUSETTS RULES OF APPELLATE PROCEDURE RULE 3

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal and shall, in civil cases, designate the judgment, order or part thereof appealed from.

* * *